NO. 71054-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CHRISTOPHER PIRIS,

Appellant,

vs.

ALFRED KITCHING and JANE DOE KITCHING, husband and wife and their marital community, SOCIETY OF COUNSEL REPRESENTING ACCUSED PERSON (SCRAP), ERIC NIELSEN and JANE DOE NIELSEN, husband and wife and their marital community, NIELSEN BROMAN & KOCH PLLC,

Respondents.

BRIEF OF RESPONDENTS KITCHING & SCRAP

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I. INTRODUCTION

The trial court correctly dismissed the plaintiff's case in this legal malpractice action asserted against his criminal defense attorneys. The trial court followed established Washington law and held that plaintiff could not establish an essential element of his claims, his actual innocence.

This Court should affirm the trial court's dismissal of Mr. Piris' claim for legal malpractice.

II. RESTATEMENT OF ISSUE

Did the trial court correctly grant summary judgment dismissing Mr. Piris' legal malpractice claims against his criminal defense attorneys because he did not meet his burden to establish actual innocence of the underlying crime and his claims do not fall under the very limited *Powell* exception because the sentence he served was not beyond the maximum sentence permitted by Washington law for the crime for which he pled guilty?

III. FACTS

In December 1997, Mr. Piris was charged with three counts of Rape of a Child in the First Degree. CP 141. Society of Counsel Representing Accused Persons ("SCRAP"), a public-defender agency, was appointed to represent Mr. Piris in these proceedings. CP 21. SCRAP

attorney, Alfred Kitching, represented Mr. Piris in the trial court proceedings. CP 29.

In September of 1998, Mr. Piris pled guilty to two counts of Rape of a Child in the First Degree.[1] CP 36. In the Statement of Defendant on Plea of Guilty (the "Plea"), it was noted that the standard sentencing range for Mr. Piris' crimes was 159 to 211 months of confinement. CP 30. The Plea also stated that the maximum sentence for his crimes was life imprisonment and a fine of $50,000. CP 30. Judge Charles Mertel presided over Mr. Piris' sentencing hearing on May 14, 1999. CP 55–57. Judge Mertel sentenced Mr. Piris to 159 months of confinement for both counts concurrently. CP 57.

On behalf of Mr. Piris, attorney Kitching timely filed an appeal of this sentence. CP 77. Eric Nielsen was appointed to represent Mr. Piris in the appellate proceedings. CP 79. Mr. Piris argued that the offender score and corresponding standard sentencing range utilized by the trial court was incorrect. CP 85. He argued that Mr. Piris' offender score was incorrectly calculated by utilizing the current version of RCW 9.94A.360 instead of the version in effect at the time Mr. Piris committed the crimes, and thus, the corresponding standard sentence range applied was incorrect. CP 85.

The Court of Appeals agreed, finding that by calculating Mr. Piris'

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[1] One of the Counts of Rape of a Child in the First Degree was dropped.

offender score under the version of the statute in effect at the time he committed his crimes, he had an offender score of 6, as opposed to the offender score of 7 which was utilized by the trial court. CP 93. With an offender score of 7, Mr. Piris' crimes carried a standard sentencing range of 159 to 211 months. CP 92. With the correct offender score of 6, Mr. Piris' crimes carried a standard sentence range of 146 to 194 months. CP 93. The Court of Appeals remanded the case for resentencing. CP 93.

Mr. Piris was released from incarceration on or around August 3, 2010. CP 136. Mr. Piris did not present evidence as to the exact length of time of his incarceration. CP 5 (asserting that Mr. Piris is "investigating" the actual length of time he remained in custody). The record indicates that Mr. Piris served somewhere between 137 and 154 months.[2] On or around March 29, 2012, Mr. Piris violated a condition of his release from custody and a hearing was scheduled for May 2012 to address this violation. CP 153. At this hearing, it was discovered that Mr. Piris was never resentenced. CP 153.

On May 7, 2012, Judge Timothy Bradshaw presided over Mr. Piris' resentencing hearing. CP 196, 201. The standard sentencing range

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[2] Between the date of sentencing and the date of his release, Mr. Piris spent approximately 137 months in custody. At the time of his sentencing, however, he had already been incarcerated for somewhere between 133 days (4.5 months) and 17 months, but some of this time may relate to other charges or convictions. CP 5, 69.

for Mr. Piris' offenses was calculated to be 146 to 194 months. CP 197. The maximum sentence for Mr. Piris' crimes was again identified as life imprisonment and/or a fine of $50,000. CP 197. Judge Bradshaw sentenced Mr. Piris to 146 months of confinement for both counts concurrently. CP 199.

Mr. Piris filed this action on March 28, 2013 alleging that his prior attorneys committed legal malpractice during their representation of him in the criminal proceedings described herein. CP 154.

All defendants moved for summary judgment. CP 1-14 (Nielson's Motion); CP 144-145 (Kitching's Joinder); CP 148-150 (King County's Joinder).

The Honorable Richard Edie granted summary judgment to the defendants. CP 248-250.

IV. STANDARD OF REVIEW

This Court reviews *de novo* the dismissal on summary judgment of Mr. Piris' claims for legal malpractice. *Powell v. Associated Counsel for the Accused,* 125 Wn. App. 773, 775, 106 P.3d 271 (2005).

There are no material disputed facts in this appeal. The issues presented to this Court for decision are legal, also calling for *de novo* review. *State v. Williams,* 96 Wn.2d 215, 220, 634 P.2d 868 (1981).

Application of these standards should result in affirmance.

V. ARGUMENT

The trial court appropriately dismissed this criminal legal malpractice case on summary judgment. This Court should affirm on the basis of the well-established innocence rule which requires a criminal legal malpractice plaintiff to establish actual innocence of the crimes at issue in the underlying proceedings. Mr. Piris failed to present, or even allege, any evidence or argument to establish his actual innocence of the underlying crimes. Dismissal was proper as a matter of law.

Mr. Piris pled guilty to two counts of First Degree Rape of a Child. CP 36. As determined by this Court on an appeal of Mr. Piris' original sentence, the correct standard sentencing range for these crimes was 146 to 194 months. CP 93. Mr. Piris' original sentence was on the low end of this correct standard sentence range, 159 months. CP 57. Mr. Piris' original sentence was well within the legally permissible sentence of life imprisonment for the crimes of which he was convicted. Mr Piris served somewhere between 137 and 154 months.[3] The sentence he served was also well within the legal, and standard, range for these crimes. Mr. Piris did not receive nor serve an "illegal" sentence. He brought these legal malpractice claims contending he could have gotten a better deal if the recalculation of his sentence occurred earlier. The Washington Supreme

[3] *See* note 2 *supra.*

Court has clearly stated that a legal malpractice cause of action does not exist in these circumstances.

A. The innocence rule established by the Washington Supreme Court requires a plaintiff in a legal malpractice action against his criminal defense lawyer to prove "actual innocence."

Washington has adopted the innocence rule, requiring a plaintiff to prove actual innocence as an essential element of a legal malpractice claim arising out of the attorney's representation of a client in criminal proceedings. *Ang v. Martin*, 154 Wn.2d 477, 114 P.3d 637 (2005); *Falkner v. Foshaug,* 108 Wn. App 113, 29 P.3d 771 (2001). The Washington Supreme Court in *Ang* explained that to satisfy proximate cause for any legal malpractice action arising out of criminal proceedings, the legal malpractice plaintiff/criminal defendant must prove actual innocence under a civil standard of proof, as follows:

> Moreover, proving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact and legal causation. *Falkner,* 108 Wn. App. at 115 (noting that criminal malpractice plaintiff must prove that "deficient representation, not his illegal acts . . . [was] the proximate cause" of harm). Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm. Likewise, if criminal malpractice plaintiffs cannot prove their actual innocence under the civil standard, they will be unable to establish, in light of significant public policy considerations, that the alleged negligence of their defense counsel was the legal cause of their harm.

Ang, at 484–485.

The innocence rule is premised on several policy objectives. These important objectives include preventing criminals from benefiting from their own bad acts and preventing of a flood of nuisance litigation from criminals who believe they could have gotten a better deal. The Supreme Court explained its rationale as follows:

> Summarizing the policy concerns, the *Falkner* court observed that, "[r]equiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefiting from their own bad acts, maintain respect for our criminal justice system's procedural protections, remove the harmful chilling effect on the defense bar, **prevent suits from criminals who 'may be guilty, [but] could have gotten a better deal,' and prevent a flood of nuisance litigation."** 108 Wn. App. at 123–24 (footnotes omitted) (quoting *Stevens v. Bispham*, 316 Or. 221, 851 P.2d 556, 565 (1993)).

Ang, at 485 (emphasis added).

In this case, Mr. Piris is a criminal suing over just such a "could have gotten a better deal" situation. He cannot prove his actual innocence; he pled guilty. The Supreme Court has held that a legal malpractice cause of action does not exist in these circumstances. His case was appropriately dismissed.

B. Appellant cannot prove actual innocence; his theory that his sentence was "illegal" fails because his sentence was not beyond the term the Court was authorized to impose.

This Court recognized a narrow exception to the innocence rule

where a plaintiff suffers from an illegal sentence in *Powell v. Associated Counsel for the Accused*, 125 Wn. App. 773, 106 P.3d. 271 (2005) (*Powell* I). That exception does not apply here. In *Powell* I, the plaintiff alleged that he was sentenced to, and served, an illegal sentence, serving a felony sentence on a misdemeanor crime. *Id.* at 774. The trial court dismissed the claim on a CR 12(b) motion to dismiss. *Id.* at 775. The Court of Appeals reversed, holding that a criminal malpractice claim may lie where, "Powell has served substantially more time than the trial court was **authorized** to impose for a gross misdemeanor." *Id* at 777 (emphasis added). Mr. Piris cannot rely on *Powell* to revive his claim. In contrast to the criminal malpractice plaintiff in *Powell*, Mr. Piris did not serve any time longer than a court was legally authorized to impose on him for the crimes he committed. Piris served a sentence that was authorized, and appropriate, under the laws of the state of Washington.

This Court should affirm the trial court because the holding in *Powell* does not extend to the facts of this case. This conclusion is reinforced by the Court's opinion on reconsideration in *Powell*. After the defendants in *Powell* sought review from the Supreme Court, the Supreme Court directed this Court to reconsider in light of the *Ang* case they had decided after the first *Powell* opinion. *Powell v.*

Associated Counsel for the Accused, 155 Wn.2d 1024; 123 P.3d 120 (2005). The opinion on reconsideration clarified that the exception to the innocence rule was "very limited." *Powell v. Associated Counsel for the Accused*, 131 Wn. App. 810, 815, 129 P.3d. 831, 833 (2006) (*Powell II*). The Court first stressed that the basis for the exception was that Mr. Powell was "sentenced to a term substantially **longer than the maximum term allowed by statute**, and the defendant actually served time in prison beyond the correct maximum term." (emphasis added) *Id.* The Court then emphasized the limited nature of the exception, remarking that the holding was fact-specific, as follows:

> Therefore, under the facts of this case, we adopt a **very limited exception** to the rule requiring proof of actual innocence in a legal malpractice case stemming from a criminal matter.

Id. The Court very clearly signaled that the exception was not elastic nor would the court seek to expand it.

The "very limited exception" explained in *Powell II* requires that a plaintiff establish he or she was sentenced to and actually served time "beyond the correct maximum term." Mr. Piris has not even alleged such a sentence. Mr. Piris has only brought a claim for damages for having served a **longer** legal sentence than he might have

served. Such a cause of action has been rejected in the state of Washington. *Ang*, 154 Wn.2d 477.

Mr. Piris' original sentence was within the maximum term allowed by statute and Mr. Piris did not serve a sentence beyond the correct maximum term allowed by statute. As determined by the Appellate court on an appeal of Mr. Piris' original sentence, the correct standard sentencing range for these crimes was 146 to 194 months. CP 93. Mr. Piris' original sentence was on the low end of this standard sentence range, 159 months. CP 57. His sentence was legal.

Mr. Piris' brief variously morphs his description of Mr. Piris' sentence from serving longer than the "correct" sentence to terming it as an "illegal sentence" by the end of the brief. Mr. Piris has provided no authority standing for the proposition that his original sentence of 159 months, which falls within the correct standard range for sentencing, is an "illegal" sentence. He has not provided any such authority because it does not exist. In fact, such authority would create an absurd result by establishing sentences within the standard range are "illegal." The fact that a judge had discretion to have awarded less does not make the sentence "illegal". Mr. Piris' claim is a "could have had a better deal" claim. This type of claim has already been rejected

by the Supreme Court. *Ang*, 154 Wn.2d 477.

Powell stressed that the limited exception to the innocence rule only applies where the criminal malpractice plaintiff was "sentenced to a term substantially **longer than the maxi mum term allowed by statute**, and the defendant actually served time in prison beyond the correct maximum term." *Id.* (emphasis added). In *Powell,* the plaintiff pled to what turned out to be a gross misdemeanor but served a felony term. *Powell* I, 125 Wn. App. at 777. Mr. Piris can show no such facts in his case. Mr. Piris was not sentenced to, nor did he serve, such a sentence. Mr. Piris' sentence was not illegal. Mr. Piris' claim does not, and cannot, fall within the very limited *Powell* exception.

In his Opening Brief, Mr. Piris wrongly asserts in a footnote without any citation to the record, pertinent authority or clear discussion that Defendants are "collaterally estopped" from arguing that the sentence of 159 months was lawful. *Opening Brief* 4, note 2. Mr. Piris makes this unsupported assertion while simultaneously stating that Judge Eadie never addressed the argument and the defendants "did not cross-appeal." *Id.* The two remarks are contradictory. The footnote requires no response from this Court for its lack of citation and explanation and for its passing treatment. *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7,

802 P.2d 784 (1991) ("In the absence of argument and citation to authority, an issue raised on appeal will not be considered."); *State v. Johnson*, 69 Wn. App. 189, 194 note 4, 847 P.2d 960 (1993) (court declined to address merits of argument mentioned only in a footnote, stating, "placing an argument of this nature in a footnote is, at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal.").

This Court, moreover, can affirm on any basis supported by the record. *Nast v. Michels*, 107 Wn.2d 300, 308, 107 Wn.2d 300 (1986) ("[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.") Regardless, Defendants argued in their trial court briefing—and the record shows—that the claim should be dismissed because 159 months was a lawful sentence. *See* CP 8-10, 221, 225. This Court can, and should, affirm on that basis.

Contrary to Mr. Piris' unsupported suggestion, Defendants were not required to cross appeal to achieve affirmance on this basis pursuant to RAP 2.4(a), which only requires a cross appeal when a party is seeking affirmative relief.[4] "[N]otice of cross-review is

[4] The pertinent part of RAP 2.4(a) reads: "The appellate court will grant a respondent affirmative relief by modifying the decision which is

essential if the respondent 'seeks affirmative relief as distinguished from the urging of additional grounds for affirmance.'" *State v. Sims*, 171 Wn.2d 436, 442-3, 256 P.3d 285 (2011) (RAP 2.4(a) "does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of the lower court."). Defendants seek only affirmance.

This Court should affirm because Mr. Piris cannot prove his actual innocence and it is undisputed that his sentence of 159 months was within the maximum term allowed by statute.

C. Appellant's reliance on non-binding authority is not persuasive where binding authority exists.

Mr. Piris seeks to have this Court follow a treatise where Washington has specific case law on point. *See Opening Brief* 4, citing 771 R. Mallen & J. Smith, Legal Malpractice § 26.13 (2007). The Court should find this unpersuasive. The treatise does not address Washington's specific law. The treatise instead amalgamates law from across the country, including states that have not adopted the innocence rule. A similar logic was addressed and specifically rejected by Division I in *Owens v. Harrison*, 120 Wn. App. 909, 86

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the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case."

P.3d. 1266 (2004). In *Owens*, the appellant's case had been dismissed on summary judgment for failure to establish the innocence requirement. *Id.* at 911. Owens argued for an exception to be carved out where counsel had failed to convey a plea offer. *Id.* at 914. Owens attempted to rely upon out of state authority to support that argument. *Id.* The court in *Owens* noted that the cited authorities did not address the public policy rationale upon which the innocence requirement had been adopted in *Falkner*. *Id.* The court went on to note that other jurisdictions had rejected the innocence requirement, while Washington had adopted it. *Id.* For these same reasons, Mr. Piris' reliance to the treatise fails.

The trial court appropriately followed established Washington law. In a legal malpractice action arising from a representation in a criminal action, the plaintiff must prove actual innocence. *Ang*, 154 Wn.2d 477. Piris cannot prove actual innocence. A limited exception to the innocence requirement exists, but this exception only applies to circumstances where the defendant was sentenced to and served a sentence beyond the maximum sentence authorized by Washington law. Piris did not serve a sentence longer than the maximum sentence authorized by Washington law. His claim does not fall within the exception carved out and described by this Court in either *Powell*

opinion. The trial court appropriately dismissed his complaint.

VI. CONCLUSION

This Court should affirm. It is undisputed that Mr. Piris was not sentenced to, nor did he serve, a sentence "longer than the maximum term allowed by statute." The exception to the innocence rule does not apply. Mr. Piris must show he was actually innocent of the crimes at issue in the underlying proceedings. He did not meet this burden. *Ang, Faulkner, Owens,* and both *Powell* decisions support affirmance.

Respectfully submitted on this 14th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 14th day of March, 2014, I arranged for service *via U.S. mail* of the foregoing Respondent's Brief on the parties to this action as follows:

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